Supreme Court, U.S.

No. 06-1591

MAY 29 2007

OFFICE OF THE CLERK

IN THE

United States Supreme Court

PERRY REICH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

FREDERICK C. MEYER, ESQ.
Counsel of Record
10 Sagamore Road
Hampton Bays, New York 11946
631-728-8778

May 29, 2007

QUESTIONS PRESENTED

1. The term "forgery" is commonly defined as fashioning or reproducing a document "for fraudulent purposes." Does 28U.S.C. § 505, the statute punishing forgery of federal judicial documents, require the Government to prove a specific intent to defraud, based on that definition, as consistently held by the Sixth Circuit since 1931, and implicitly recognized by the Seventh and Eleventh Circuits, or is intent to defraud not an element of the crime, as held by the Tenth Circuit and Second Circuit in this case?

2. The District of Columbia, Third, Fifth, Eighth and Eleventh Circuits, building upon *Michelson v United States*, 335 U.S. 469 (1948), have recognized that cross-examination of a character witness concerning specific instances of alleged misconduct is fraught with unfairness and potential for abuse. In these Circuits, inquiry is not permitted until the prosecutor establishes, prior to conducting cross-examination and in the absence of the jury, that there is a good faith basis for believing that (i) the incident occurred and (ii) is either a matter likely to be known in the community at large, for a "reputation witness," or otherwise likely to be personally known by the witness, for an opinion witness. In the Second Circuit, as held in this case and in a prior published opinion, cross-examination of character witnesses is a matter committed entirely to the broad discretion of the trial court and such knowledge need not be established.

(a) In this case, after the prosecutor posed the question, and objection was made by defense counsel, the district court permitted the prosecutor to inquire whether, if the character witness knew that petitioner had breached a pro-

vision in a partnership agreement, which required written permission to change beneficiaries, and petitioner had done so without such written permission, and designated the partnership instead of the partner's family as beneficiaries, that would change his opinion or the community opinion of petitioner. Oral permission had been given and petitioner never received any of the proceeds of the policy. The prosecutor was not required to establish community or personal knowledge. Is the Second Circuit procedure, which is at variance with other Circuits, interdicted by *Michelson* and the Federal Rules of Evidence?

(b) Over objection, the prosecutor was permitted to use a hypothetical question that assumed that the incident occurred and was a reflection of poor character and dishonesty. Does *Michelson* remain good law, in which event the question was improper, or are the district court and the Ninth Circuit correct in holding that *Michelson* has been superceded by the Federal Rules of Evidence?

3. Insofar as pertinent, 18 U.S.C. § 1512(c)(2), enacted as part of the Sarbanes-Oxley Act, punishes the obstruction of judicial proceedings. To sustain a conviction, must the Government prove that a defendant's conduct was intended to deceive the Court, and, if the prosecution is predicated on the discretionary acts of third parties, that the defendant's conduct had the "natural and probable" consequence of obstructing justice, by affecting the merits?

4. In a prosecution under 18 U.S.C. § 1001, based upon an F.B.I. agent's interview of the defendant at a proffer session, the indictment charged that the defendant made an affirmative falsehood, but the agent did not testify to any such specific inquiry. Rather, based on notes, not a transcript or tape recording, the agent testified that defendant

did not "admit" guilt. May the conviction be sustained on the theory that the jury could have inferred that defendant denied having sent the order, or, is the Ninth Circuit correct in holding that there be "clear evidence of what was said," with a specific question and specific answer?

5. Depending upon this Court's decisions in *Clairborne v United States*, Docket No. 06-5618, and *Rita v United States*, Docket No. 06-5754, currently *sub judice*, should the case be remitted for re-sentencing?

LIST OF PARTIES

All of the parties are listed in the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iv
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	viii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Introduction	2
B. The Trial Testimony	5
1. The Government's Case	5
2. The Defense Case and Character Testimony	8
3. Government Rebuttal	11
C. Verdict, Post-Trial Motions and Sentencing	12
D. Proceedings in the Court of Appeals	13

Page

REASONS FOR GRANTING THE WRIT 14

A. Introduction 14

B. The Circuits are Divided on the Question whether Fraudulent Intent is a Required Element of Forgery Under 18 U.S.C. § 505: The Better View is that a Conviction Cannot Stand Unless the Government Proves Fraudulent Intent Beyond A Reasonable Doubt. 14

C. The Circuits are divided on the impact that F.R. Evid. 405 has on this court's decision in *Michelson v United States*, 335 U.S. 469 (1948) and the scope of Permitted Cross-Examination of character witnesses: the Better View requires a Prosecutor to seek a ruling outside the Jury's presence and demonstrate a Good Faith factual basis for the incidents sought to be raised in Cross-Examination and that the events are of a type likely to have become a matter of general knowledge in one community or otherwise known to the witness. 17

D. Deception of a Court and a Tendency to Affect the Merits are Required Elements of 18 U.S.C. § 1512(c)(2) 23

E. Absent "Clear Evidence of What was Said" a Conviction Under 18 U.S.C. § 1001 Cannot Stand. 27

Page

F. Depending Upon this Court's Decisions in *Clairborne v United States*, Docket No. 06-5618, and *Rita v United States*, Docket No. 06-5754, the Case Should Be Remitted for Reconsideration of Sentence. 19

CONCLUSION..... 30

APPENDIX

"A" Opinion of the Court of Appeals 1a

"B" Opinion of the District Court..... 26a

"C" Opinion of Magistrate Judge in *Ryan Beck & Co. v Fakih*, 268 F.Supp.2d 210 (E.D.N.Y.), *motion denied*, 273 F.Supp.2d 393 (E.D.N.Y. 2003)..... 59a

TABLE OF AUTHORITIES

Page

A. U.S. SUPREME COURT CASES

Allied Chemical v Daiflon, 449 U.S. 33 26

Arthur Anderson, LLP v United States, 544 U.S. 696 27

Clairborne v United States, Docket No. 06-5618.....iii, vii, 29

Crawford v Washington, 541 U.S. 36..... 22, 30

Koon v United States, 518 U.S. 81..... 21

Levinson v United States, 47 F.2d 470..... 14

Lorillard v Pons, 434 U.S. 575 17

Mallard v United States District Court, 490 U.S. 296 26

McNally v United States, 483 U.S. 350..... 16

Michelson v. United States, 355 U.S. at 469 .....v, vi, 17, 21, 22, 24

Rita v. United States, Docket No. 06-5754 29

United States v Aguilar, 515 U.S. 593..... 27

Will v United States, 389 U.S. 90..... 26

B. FEDERAL CASES

Awkard v United States, 352 F.2d 641 22

Gross v United States, 394 F.2d 216 18

Richmark Corp. v Timber Falling Consultants, 730 F.Supp. 1525..... 24

Page

Ryan Beck & Co. v Fakih,
268 F.Supp.2d 210 ..... 3, 7, 26

United States v Adair, 951 F.2d 316, 319 ..... 18, 19

United States v Barber, 39 F.3d 285, 288 ..... 16, 19

United States v Bertrand, 596 F.2d 150 (6th
Cir. 1979), *cert. denied*, 450 U.S. 1004 15

United States v Birney, 686 F.2d 102 ..... 18, 20

United States v Bruguie, 161 F.3d 1145,
1149-1150 ..... 19, 20

United States v Cowan, 116 F.3d 1360 15

United States v Craft, 105 F.3d 1123 25

United States v Curtis, 644 F.2d 263, 268, 269 .... 18, 19

United States v Duke, 492 F.2d 693, 696 ..... 18, 22

United States v Dyer, 546 F.2d 1313 15

United States v Good, 326 F.3d 589 28

United States v Hutcherson, __ F.Supp. 2d
2006 WL 270019 25

United States v Jiang, 476 F.3d 1026, 1030 28

United States v Krapp, 815 F.2d 1183 (8th Cir.),
cert. denied, 484 U.S. 860 18

United States v Lewis, 482 F.2d 632 18

United States v London, 714 F.2d 1558 15

United States v Lundwall, 1 F.Supp.2d 249 24

United States v Martinez, 413 F.3d 239 30

Page

United States v Merritt Meridan Construction Corp., 95 F.2d 153 (2d Cir. 1996) *affg*..... 23

United States v Monteleone, 77 F.3d 1086, 1089, 1090, 1091 .....12, 18, 19, 22

United States v Reich, 479 F.3d 179 ..... 1, 12

United States v Sainz, 772 F.2d 559, 565 28

United States v Scholl, 166 F.3d 964, 974.....17, 19, 21

United States v Snow, 670 F.2d 749 16

C. OTHER CASES

Arrow Plumbing Co. v Dare Construction Corp., 212 N.Y.S.2d 438..... 23

D. CONSTITUTIONAL & STATUTORY PROVISIONS

U.S. Const., Amdt. VI..... 1, 28

18 U.S.C. § 1001 .....ii, vi, 2, 27, 28

28 U.S.C. § 1254..... 1

18 U.S.C. § 1503..... 24

18 U.S.C. § 1512.....2, 23, 24

18 U.S.C. § 1512(c).....ii, v, 23, 24, 26

18 U.S.C. § 505.....vi, 1, 2, 12, 13, 14, 15

Pub. L. No. 80-772, 62 Stat. 683 16

Pub.L. No. 107-204, 116 Stat. 745..... 23

Page

E. RULES AND REGULATIONS

F.R. Crim. P. 41 3

U.S.S.G. § 3B1.3 ..... 13, 29

U.S.S.G. § 3C1.1 ..... 13, 29

Wright & Graham, Federal Practice & Procedure, § 5268, at 620 20

F. Texts and Treatises

Black's Law Dictionary 14

Britannica Concise Encyclopedia 14

O'Malley, Grenig & Lee, Federal Jury Practice & Instructions (West 2001) 16

Webster's Third New International Unabridged Dictionary 14, 27

Williston on Contracts (4th ed) 23

Wright & Graham, Federal Practice and Procedures 20

G. Other Authorities

Anchincloss & Walsh, Obstruction of Justice, 42 Am.Crim.L.Rev. 721, 746-47 24

Note, Anticipating Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute, 89 Corn. L. Rev. 1519 (2004) 24

Note, Evidence Tampering, 53 Duke L.J. 1215 24

Page

Roadcap, Obstruction of Justice, 41 Am.Crim. L.Rev. 911, 937..... 24

B. Vango, S. Kagen, & J. Classen, *The Sarbanes-Oxley Act of 2002: A Securities Litigation Perspective*, 132 PLI/Corp. 24

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *United States v Reich*, 479 F.3d 179 (2d Cir. 2007), and may be found in Appendix "A." The opinion of the district court is reported at 420 F.Supp.2d 75 (E.D.N.Y. 2006) and is attached hereto as Appendix "B."

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254. The Second Circuit issued its opinion on March 2, 2007, and no petition for rehearing was filed. Since this petition is being filed within 90 days of the entry of judgment of the Court of Appeals, it is timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amdt. VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

18 U.S.C. § 505:

> "Seals of courts; signatures of judges or court officers. Whoever forges the signature of any judge . . . of any court of the United States . . . or knowingly concurs in using such forged or counterfeit signature . . . for the purpose of authenticating any proceeding or document . . . knowing such signature . . . to be false . . . shall be fined under this title or imprisonment not more than five years, or both."

18 U.S.C. § 1001(a)(2):

> "... [w]hoever, in any matter within the jurisdiction of the Government of the United States, knowingly and willfully ... makes any materially false, fictitious, or fraudulent statement or representation" has committed a crime.

18 U.S.C. §1512:

> "Tampering with a witness, victim or an informant
>
> (c) "Whoever corruptly—
>
> (2) otherwise obstructs, influences or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years or both."

F.R. Evid. 405(a):

> "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct."

STATEMENT OF THE CASE

A. Introduction

Defendant, PERRY REICH, a highly respected appellate attorney, stands convicted of obstruction of justice, under 18 U.S.C. § 1512(c) (Sarbanes-Oxley Act), forgery of a judge's signature, under 18 U.S.C. § 505, and false statements to law enforcement officers under 18 U.S.C. § 1001. The law firm of Joel Davidson ("Davidson") filed a law-

suit in the United States District Court for the Eastern District of New York, entitled *Ryan Beck & Co. v Fakih*, 268 F.Supp.2d 210 (E.D.N.Y.) *motion denied*, 273 F.Supp.2d 393 (E.D.N.Y. 2003), against Reich and others to stay arbitration of a securities claim before the National Association of Securities Dealers. The Magistrate Judge, to whom the case was assigned, originally denied a motion for a preliminary injunction, against the defendants and permitted the arbitrations to proceed pending the outcome of the civil suit. Davidson brought a motion for summary judgment. While that motion was pending, a bogus order appeared in which the Magistrate Judge purported to recuse herself and grant a preliminary injunction against all defendants, pending further proceedings before a different judge. The bogus order was the *corpus delicti* of the underlying crimes.

Prior to trial, a motion was made to suppress evidence, based upon the failure of the F.B.I. agent conducting the search to tender a copy of the search warrant, as required by F.R. Crim. P. 41 (Tr. 623). Insofar as pertinent, the search uncovered a manual for an ancient fax machine, a Canon Faxphone 8. In addition, the hard drives on the defendant's home and office computers were copied. The agent executing the warrant contended that he also found a fax machine in the basement, which the warrant directed be seized, but he "forgot" to take it (Tr. 621). The motion to suppress was denied.

In addition, a motion *in limine* was made, predicated on the Government's failure to obtain the original purported fax that Davidson claimed he had received. Following a hearing, that motion was also denied, and the Government was permitted to use "copies."

Finally, a pre-trial *Daubert* hearing was conducted to determine the reliability of an out-of-court experiment conducted by a Government expert. Following the hearing, the Court held that evidence concerning the out-of-court experiment would be received.

At trial, the Government relied upon telephone records showing that a telephone at defendant's home had connected to a fax machine at Davidson's office, expert testimony, based on an out-of-court experiment, *purporting* to establish (1) that the Davidson facsimile would "time-out" after a specified interval, and (2) that the differences in the number of pages listed as received on the Davidson fax log, (two pages as opposed to the four sheets comprising the cover page and bogus order), could be explained if all of the pages had been faxed from a stand alone fax machine in a single continuous sheet, namely "tractor paper."

Defendant, who took the stand in his own defense, and denied sending the fax, presented expert testimony as well. The defense expert noted—and the Government witness agreed—that there was no evidence of the bogus order on any of the hard drives cloned from defendant's computers, and that there would be traces of it had the document been erased. Similarly, there was no evidence of a fax on any of defendant's computers, which would have been the case had it been faxed through the fax motion on the computer, albeit it would be impossible to fax "tractor paper" through a fax modem. In addition, the F.B.I. never obtained the purported original fax. The defense expert believed that the document never was a fax, but was always a photocopy.

B. The Trial Testimony

1. The Government's Case

Telephone records showed that a telephone call from Reich's home had connected to the Davidson fax machine at approximately 11:08 a.m. on June 17, 2003, and that the call lasted some three minutes (Tr. 296, 303-304, 323). Davidson's secretary did not notice any fax arrive because she was out of her office, and first noticed it "on the machine" when she returned (Tr. 103, 120, 129, 132-133). On the date that the fax was purportedly received, she had no idea of the time that she noticed it; she could only say that it arrived sometime that morning (Tr. 134).

The secretary's belief that the fax arrived at either 11:08 a.m. or 11:27 a.m., was based upon two entries in the fax log that did not contain the telephone numbers of the sender (Tr. 120, 125-127). Initially, the secretary thought that the 11:27 a.m. listing involved the bogus fax, but subsequent events led her to change her mind (Tr. 152). In the end, the secretary did not know whether the document was actually faxed or whether it was a photocopy left at her machine (Tr. 154).

A firm associate received the document from the firm secretary (Tr. 273). The associate could not fix a particular time of receipt, putting it at sometime between 11:00 - 11:30 a.m. and even as late as 12:00 p.m. noon, based on the time that she faxed the document to Mr. Davidson at home (Tr. 248).

The document consisted of four pages (GA 01-04). One page was the "cover sheet" (GA 01). The other three pages constituted the bogus order (GA 02-04). The entry on the

fax log at the Davidson firm for the 11:08 a.m. call indicated that *two* pages were received (Govt. Ex. "2").

The bogus order purported to grant a preliminary injunction against certain defendants and to, *sua sponte*, recuse the Magistrate Judge and refer the matter back to Chief Judge Korman (Tr. 183, 238, 348-49, 357).

In the interim, Davidson had made a motion for summary judgment. When the Magistrate Judge had not decided the matter according to Davidson's time table, Davidson filed a petition for a writ of mandamus in the Court of Appeals against the Magistrate Judge.

Upon receipt of the bogus order, Davidson instructed his assistant to send it to attorneys representing his client in other litigation (Tr. 192, 193, 360). He also dictated letters to arbitration panels, to the Court of Appeals, to Judge Korman and to other attorneys (Tr. 360, 361).

The next day, June 18, 2003, one of the attorneys for the defendants in the civil litigation called the Magistrate Judge to determine whether a decision had, in fact, been issued (Tr. 530, 536). The Magistrate Judge's law clerk asked that the bogus order be faxed to chambers (Tr. 530). Upon receipt, the Magistrate Judge contacted Judge Korman, the United States Attorney, and the Court of Appeals (Tr. 534). She also issued an order, dated June 18, 2003, stating that the earlier document was false (Tr. 535).

After learning that the order was bogus, the Davidson firm asked Federal Express not to deliver the packages or informed the intended recipients not to accept them (Tr. 219, 220, 363). Davidson also sent letters to Judge Korman, the Magistrate Judge, and the Court of Appeals (Tr. 275, 277, 363, 364, 365).

The bogus order *never* became part of any court record and was not mentioned in the Magistrate Judge's subsequent decision in the case (Tr. 557-560). *See, Ryan Beck & Co. v. Fakih*, 268 F.Supp2d 210 (E.D.N.Y.) *motion denied*, 273 F. Supp.2d 393 (E.D.N.Y.). In fact, when initially interviewed by the F.B.I., the Magistrate Judge's law clerk suggested that it might have been a "joke" (Tr. 563).

The Government conceded that the bogus order was not an original fax, and offered no explanation as to what happened to that original fax (Tr. 628-29, 630, 636-37) The copies that it offered differed in material respects. Some had an "extended page 2.1" on it; others did not. A copy of the document that was allegedly received by Davidson at his home, which he first gave to the Government a month before trial (Tr. 634), had an "extended page 2.2" on it (Tr. 634-35). The Government speculated that the differences could have been caused by errors in photocopying, but there was no testimony concerning photocopying, other than a copy given to F.B.I. Agent Wilfling when he came to the Davidson office in June, 2003 (Tr. 156, 168, 211, 235, 267, 285, 570).

According to the Government expert, the three minute telephone call was consistent with a fax transmission since the type of fax machine in the Davidson office would terminate the connection if a fax signal was not received within approximately 41 seconds (Tr. 406, 454-55). The expert was of the opinion that the fax log indication of two pages, as opposed to four pages, and the "extended page" notation on two of the copies, was the result of the Davidson machine reading the last two pages as one long page (Tr. 463). He used tractor paper to conduct the experiment, though he later conceded on cross-examination that it

would take special equipment to reproduce the bogus order on tractor paper (Tr. 460-468, 490-91), that there was no evidence that the pages overlapped (Tr. 488-89), and that if the pages were taped together, it would probably jam the machine (Tr. 489).

2. The Defense Case and Character Testimony

The defense expert testified that his examination of the computer images seized by the F.B.I. showed that the bogus order was not created on any of the defendant's computers, as the F.B.I. expert conceded (Tr. 723-24, 729-31), and it could not be sent through the defendant's computer fax modem (Tr. 997-99). He noted that it was difficult, if not impossible, to activate the "extended page" function on the Davidson machine, as each time he tried this experiment with taped pages, his machine jammed (Tr. 1000-01). Further, the "extended page function" could not be triggered by a facsimile transmission sent by a fax modem and a flatbed scanner (Tr. 1002-03).

Although, in its post-trial opinion the district court found the defense expert wanting because he did not use a Faxphone 8 in his experiment, *see, United States v Reich*, 420 F.Supp.2d 75, 86 (E.D.N.Y. 2006), neither did the Government expert (Tr. 491). To the extent that the district court criticized the defense expert's failure to use tractor paper, the Government expert admitted that special equipment was necessary to copy the bogus order on tractor paper, that defendant was not likely to have such special equipment, that there was no evidence of overlap, and that if taped together, the machine would jam (Tr. 488-491).

The expert also challenged the authenticity of the "copies" of the bogus order, explaining why the document was not

originally sent as a facsimile transmission (Tr. 1623-27). Using a power-point presentation, he showed that the degraded quality of the letters on different pages demonstrated that each of the pages was from a different generation, something that would not happen in normal photocopying (Tr. 1023-27).

Defendant took the stand in his own defense, explaining that his computer fax modem sometimes engaged his telephone line and causes the line to remain connected after the call has ended (Tr. 887-88). The defense expert, to a reasonable degree of scientific certainty, was of the opinion that, when defendant hung-up, the fax modem on defendant's computer "latched" on to the Davidson fax, and continued to "hand-shake" until the Davidson machine disconnected, thereby leaving defendant's line still open (Tr. 1037-38, 1176-77, 1196). The Government expert conceded that, if this had taken place, it would have taken more than 41 seconds for the Davidson machine to disconnect (Tr. 480). The fact that the receiving machine "timed out" after three minutes and 18 seconds, and the telephone records indicate that defendant remained connection for four minutes 25 seconds, could not be explained in any other way (Tr. 1039, 1180).

James Pelzer, the Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, an intermediate New York Appellate Court, testified to defendant's good character (Tr. 812-815). Pelzer knew defendant since the early 1980's, when defendant served as a law clerk to then Associate Justice Vito J. Titone, and stayed with Judge Titone upon his elevation to the New York Court of Appeals (Tr. 811-12, 814). He also knew defendant when he was a law clerk to Judge Jacob Fuchsberg, also of the

New York Court of Appeals (Tr. 812, 814). Pelzer explained that defendant was "a person of high honesty and integrity, a person you can trust, and you can trust his word. I think that in talking of Perry [Reich] with others, others share that same opinion" (Tr. 813, 815).

Without first seeking a ruling from the court outside the presence of the jury, the Government sought to attack defendant's character by asking about an allegedly unauthorized change in a partnership life insurance policy (Tr. 817). In the jury's presence, and before establishing the *bona fides* of the inquiry, the prosecutor asked Mr. Pelzer whether his opinion would change "if you learned about Mr. Reich changing the beneficiaries of an insurance policy of Mr. Schapiro?" (Tr. 817). An objection was sustained, but the prosecutor protested, "I think it is an appropriate question" (Tr. 817). Discussion was had outside the presence of the jury, and the objection was overruled (Tr. 817). Upon protest by defense counsel, further argument was entertained.

Prior to the question, Pelzer indicated that he had no knowledge of any partnership or insurance agreements, but knew that Mr. Schapiro was deceased (Tr. 817, 818). The jury later heard that Schapiro had died of cancer. When defendant testified in his own defense, he explained that he had notified Schapiro before changing the policy beneficiary, and that he had done so to protect the firm with regard to money loaned by Schapiro's mother to Schapiro, for which the firm was responsible (Tr. 866-75). There was no dispute that defendant never received any of the proceeds of the life insurance policy, as Mr. Schapiro changed the beneficiaries to his mother and girlfriend when the policy

was assigned to him following dissolution of the partnership (Tr. 868, 953-54).

The district court declined to conduct any hearing concerning the prosecutor's good faith (Tr. 834), and upon balancing prejudice against probative value, concluded that the question went "to the heart of the government's case," given Mr. Pelzer's stature in the legal community (Tr. 841). No limiting instruction was given and challenge to the form of the question was rejected (Tr. 836-37, 846 ["Let's forget about the form."]). It should be noted that, contrary to footnote 2 in the opinion of the Court of Appeals, challenge to the form of the question *was* raised on appeal, after the panel hearing argument on an application for bail pending appeal indicated that it thought that the form of the question violated *Michelson v United States*, 335 U.S. 469, 482 (1948) (in cross-examining character witnesses "the form of inquiry, 'Have you heard?' has general approval, and 'Do you know?' is not allowed"). *See*, Government Appellee's Brief in Court of Appeals, p. 24, n. 5; Appellate Reply Brief in Court of Appeals, p. 15, n. 3.

3. Government Rebuttal

A manual to a Canon Fax Phone 8 was found during a search of defendant's home. The machine was over 20 years old and defendant testified that he had discarded it in 2000, because he was not able to connect to the newer machines, and instead used his flatbed scanner and fax modem (Tr. 891-93, 948-49). F.B.I. Agent Richard Wilfling, who obtained the search warrant that specifically sought seizure of a fax machine at defendant's residence (Tr. 583-84), claimed that he saw a fax machine at the house, but "forgot" to seize it (Tr. 621).

An employee of Canon, who had never seen or used a Canon Fax Phone 8, contended that the bogus order could have been sent from such a device, because the Fax Phone 8 did not transmit a "header," but later conceded that a "footer" on the document upside down would be a header (Tr. 1215-19).

C. Verdict, Post-Trial Motions and Sentencing

All three counts of the indictment were submitted to the jury. Counsel objected to the instructions. With respect to the forgery count (18 U.S.C. § 505), he contended that it was error to decline to change "intent to defraud" (Tr. 1445). Counsel also contended that the court improperly permitted the jury to consider an "attempt" to obstruct justice, because the indictment alleged a completed crime and the case was tried on that basis (Tr. 1248-52, 1340-41).

Following a verdict convicting him of all three counts, defendant made a motion for a judgment of acquittal, a new trial, and other relief. Some of these claims were withdrawn upon retaining new counsel (Tr. 1454-1468).

The district court denied the post-trial motions and bail pending appeal in a published opinion. *United States v Reich*, 420 F.Supp.2d 75 (E.D.N.Y. 2006). It found that defendant was not a flight risk, but held that there was sufficient evidence to support all three counts, and that none of its rulings, including the three set forth in this petition, presented substantial grounds for appeal.

Although the court acknowledged that *United States v Monteleone*, 77 F.3d 1086 (8th Cir. 1996) had held that impeachment of a reputation witness could not be undertaken if the matter at issue were private, he believed that

the Second Circuit would not follow it, and that the matter was not private, because Schapiro's family and attorneys knew about it.

The pre-sentence report calculated defendant's combined adjusted offense level at 18, which included a two point enhancement for abuse of a special skill (U.S.S.G. § 3B1.3) and a two point enhancement for obstruction of justice (U.S.S.G. § 3C1.1), due to his testimony at trial. The court found a guidelines sentence to be reasonable, and imposed a sentence of 27 months imprisonment, a fine, restitution, and supervised release, after hearing the Government's argument that the defendant's purportedly unauthorized change of the life insurance policy was a strong factor to consider in imposing sentence (S:35).

D. Proceedings in the Court of Appeals

Defendant renewed his application for bail pending appeal before the Court of Appeals. The matter was set for oral argument at which the motions panel advised both counsel that it had problems with the form of the question. Nonetheless, the panel denied the motion.

On March 2, 2007, the Court of Appeals affirmed the judgment in all respects in a published opinion. *United States v Reich*, 479 F.3d 179 (2dCir. 2007). On the issues relevant here, it concluded that there was sufficient evidence to support the conviction; that it would follow the decision of the Tenth Circuit, rather than that of the Sixth, Seventh and Eleventh Circuits, and hold that intent to defraud was not an element of 18 U.S.C. § 505; that the character impeachment was appropriate, there being no need for the prosecutor to show that the matter was known in the community or that the witness would otherwise be

expected to know about it; and that no error occurred in sentencing.

REASONS FOR GRANTING THE WRIT

A. Introduction

Each of the three issues tendered concern issues of substantial public importance that have divided the circuits. Each present the issues in a fully developed factual background, free of any procedural short comings. In addition, the Court of Appeals did not find any error to be harmless. Hence this case is an excellent vehicle to resolve these conflicts.

B. The Circuits are Divided on the Question whether Fraudulent Intent is a Required Element of Forgery Under 18 U.S.C. § 505: The Better View is that a Conviction Cannot Stand Unless the Government Proves Fraudulent Intent Beyond A Reasonable Doubt.

In *Levinson v United States*, 47 F.2d 470, 471 (6th Cir. 1931), the United States Court of Appeals for the Sixth Circuit squarely held that the forerunner of 18 U.S.C. § 505 required proof of an intent to defraud. The decision rests upon the plain meaning of the word "forgery."

As commonly understood English, "forgery" means ". . . the crime of falsely and fraudulently making or altering a writing or other instrument that if genuine might apparently be of legal effect on the rights of another." Webster's Third New International Unabridged Dictionary, p. 891. It is ". . . the making of a false writing with intent to defraud." Britannica Concise Encyclopedia, p. 679; *see also*, Black's Law Dictionary, p. 677 (8th ed. 2004).

The Sixth Circuit adhered to the *Levinson* holding in *United States v Bertrand*, 596 F.2d 150, 152 (6th Cir. 1979), *cert. denied*, 450 U.S. 1004 (1981), and *Levinson*, has been cited with approval on this point by the Seventh Circuit, *United States v Dyer*, 546 F.2d 1313, 1316 (7th Cir. 1976), and the Eleventh Circuit, *United States v London*, 714 F.2d 1558, 1563-64 (11th Cir. 1983). Although the Second Circuit in this case said that the point was not actually resolved in *Dyer* or *London*, the Tenth Circuit viewed it as ". . . accepted in other circuits that this forgery statute necessarily includes the element of intent to defraud." *United States v Barber*, 39 F.3d 285, 287 (10th Cir. 1994).

Indeed, while the language in *Dyer* may be dictum, its analysis of the statutory language is very persuasive. That Court dissected the statutory provisions and based on plain English believed that it required an intent to defraud.

In rejecting these authorities, the Tenth Circuit in *United States v Cowan*, 116 F.3d 1360, 1361 (10th Cir. 1997), searched for an ambiguity that does not otherwise exist, noting that some forgery statutes contained the terms "intent to defraud," but others, did not. Since the original enactments were not simultaneous, it is difficult to perceive what this establishes. All it can mean is that sometimes a drafter used a redundancy.

Ignoring the plain meaning of the word "forgery," the Tenth Circuit concluded, as did the Second Circuit here, that, in its view, § 505 is designed to "protect[] the integrity of a government function—namely federal judicial proceedings."

Even if that be so, it does not follow that an intent to defraud is not an element of forgery. Indeed, the Tenth Circuit construction leads to absurdities. For example, a party

invitation, "ordering" someone to appear at a specific location for the party, a holiday card "ordering" someone to have a happy holiday, or an April Fool's prank, could be prosecuted, if the "order" looked like it was genuine.

McNally v United States, 483 U.S. 350, 358 (1987), which the Second Circuit relied upon for its "historical view" of what is meant by "defraud" is totally inapposite. *McNally* held that a prior version of the Federal Mail Fraud statute was limited in scope to the protection of property rights and did not refer to the intangible right of the citizenry to have public officials perform their duties honestly. The statute has since been amended to overturn that holding. But the nub of the matter is that *McNally* did not construe a forgery statute.

In the context of a prosecution under § 505, the Tenth Circuit previously said, "A common sense and common definition of fraudulent intent demands the perpetrator act for personal benefit or to deprive the other person of something, that something need not be money." *Barber*, 39 F.3d at 288; *see also*, *O'Malley, Grenig & Lee*, Federal Jury Practice and Instructions, Criminal § 32.11 (West 2001), citing *United States v Snow*, 670 F.2d 749, 753 (7th Cir. 1982) (where a similar instruction was given).

Although neither the Second nor the Tenth Circuit Court found any "elucidating legislative history" for § 505, this ignores the fact that what was the forerunner of § 505 was re-enacted in identical form in 1948. *See*, Pub. L. No. 80-772, 62 Stat. 683. Its construction by the Sixth Circuit in 1931, 17 years earlier, was undoubtedly known to Congress. Pursuant to the legislative re-enactment doctrine, Congress is "presumed to be aware of [a] . . . judicial interpretation of a statute and to adopt that interpretation when

it re-enacts a statute without change." *Lorillard v Pons*, 434 U.S. 575, 580 (1978). Consequently, it is more likely that Congress intended to maintain the construction of § 505 previously adopted by the *Levinson* Court.

In sum, we have a split in the various circuits concerning the elements of a Federal crime. This case presents the opportunity to resolve that conflict.

C. The Circuits are divided on the impact that F.R. Evid. 405 has on this court's decision in *Michelson v United States*, 335 U.S. 469 (1948) and the scope of Permitted Cross-Examination of character witnesses: the Better View requires a Prosecutor to seek a ruling outside the Jury's presence and demonstrate a Good Faith factual basis for the incidents sought to be raised in Cross-Examination and that the events are of a type likely to have become a matter of general knowledge in one community or otherwise known to the witness.

Almost 60 years have elapsed since this court decided *Michelson v United States*, 335 U.S. 469 (1948), the seminal authority on the reception of character evidence. The Federal Rules of Evidence have somewhat liberalized the scope of character evidence, by permitting a character witness to give his or her own personal opinion of character traits in addition to pure reputation evidence.

This case represents the opportunity to resolve a conflict in the various courts concerning the scope of permissible cross-examination of character witnesses and the condition precedent to its reception, and to either reaffirm *Michelson* or modify it, as some circuits have suggested. *See, e.g. United States v Scholl*, 166 F.3d 964, 974 (9th Cir. 1999).

The decision of the Second Circuit below, as well as its prior precedents, *see, e.g. United States v Birney*, 686 F.2d 102, 108 (2d Cir. 1982), relegate the reception to character evidence and cross-examination of character witnesses to the almost unbridled discretion of the trial court. In contrast, the District of Columbia, Third, Fifth, Eighth, and Eleventh Circuits, drawing from *Michelson*, have imposed substantial procedure safeguards, deeming them required by *Michaelson* and the Federal Rules of Evidence. *See, e.g., United States v Lewis*, 482 F.2d 632, 639 (D.C. Cir.1973); *United States v Curtis*, 644 F.2d 263, 268 (3d Cir. 1981); *United States v Duke*, 492 F.2d 693, 696 (5th Cir. 1974); *United States v Monteleone*, 77 F. 3d 1086, 1089 (8th Cir. 1996); *United States v Adair*, 951 F.2d 316, 319 (11th Cir.). As the *Monteleone* court cautioned, ". . . [t]he process 'is fraught with great danger' unless circumscribed by rules of fairness grounded in demonstrated good faith on the part of the prosecution. The result could be most prejudicial to the defendant and make for a miscarriage of justice." *Monteleone*, 77 F. 3d at 1089, quoting *Gross v United States*, 394 F. 2d 216, 219 (8th Cir. 1968) and *United States v Krapp*, 815 F. 2d 1183, 1186 (8th Cir.), cert. denied 484 U.S. 860 (1987).

These courts require the prosecutor to seek a ruling outside the jury's presence *before* inquiry is made, and demonstrate both a good faith factual basis for the incidents sought to be raised during cross-examination, and that the incidents inquired about are relevant to the character traits at issue. *See Monteleone*, 77 F. 3d at 1090; *Curtis*, 644 F. 2d at 268; *Adair*, 951 F. 2d at 319. Recognizing that F.R. Evid. 405(a) permits cross-examination into "relevant specific instances of conduct," to test the reliability and credibility of the character witness, not to prove that a

defendant committed any particular bad acts, these courts hold that a prosecutor must establish *more* than a good faith belief that the incidents actually occurred. *Monteleone*, 77 F 3d at 1090; *Curtis,* 644 F. 2d at 268; *Adair*, 951 F. 2d at 319.

For a pure reputation witness, "The prosecutor must possess a good faith belief that the described events are of a type 'likely to have become of general knowledge, currency or reputation in the community.'" *Monteleone*, 77 F. 3d at 1090, quoting *Duke*, 492 F.2d at 696, and citing *Michelson*, 355 U.S. at 469; *see Curtis*, 644 F.2d at 269. The good faith showing for an opinion witness is slightly more nuanced. "[A]n opinion witness can be cross-examined only on matters bearing on his own opinion . . . ," so the ". . . relevant cross-examination is only that which bears on the fact or factual basis for the formulation of that opinion." *Curtis,* 644 F. 2d at 269, 268. In other words, the depth of community knowledge is irrelevant, and admission depends on whether the incident is something that is "easily verified" and would logically impact the opinion. *See, United States v Bruguie*, 161 F 3d 1145, 1149 (8th Cir. 1998); *cf. United States v Scholl*, 166 F.3d at 974 (cross-examination of opinion character witness proper, where based upon public charges of judicial incompetence against the defendant-judge.)

In *Bruguie*, three pure opinion witnesses testified that the defendant was a "good father." On cross-examination, they were asked whether they had considered a child abuse finding made by a governmental agency in formulating their opinions. Noting that the child abuse finding was "easily verified," 161 F. 3d at 1149, the court found the questioning permissible: "If . . . a finding of child neglect

had been made with respect to the [the defendant], and if the witnesses knew that, any grounds for believing that [defendant] was a good father would be undermined. And if, on the other hand, the witnesses were not aware of such a finding, the jury might believe that their acquaintance with the defendant was not enough to justify their opinion." 161 F. 3d at 1149.

The Eighth Circuit found the procedure employed by the prosecutor and the district court deficient, because the prosecutor made no request for a ruling outside the jury's presence before he conducted cross-examination, but affirmed because defense counsel failed to make proper objection or seek a mistrial after the questions were posed. 161 F.3d at 1149-1150.

The Second Circuit's statement that *Bruguie* somehow stands for the proposition that a prosecutor need not demonstrate that an opinion witness should have been aware of the "specific incident" before cross-examination, is plainly incorrect. If there is no reason to expect the witness to know about the incident, then the question cannot possibly be said to test the witness's credibility, and the inquiry is simply irrelevant.

Where the incident at issue is purely private, not likely to be known in the community or otherwise known to the witness personally, with the exception of the Second Circuit, all Circuits that have considered the question have held such conduct irrelevant and not a proper subject for cross-examination. *See*, 22 Wright & Graham, Federal Practice & Procedure, § 5268, at 620 (1978); *cf. United States v Birney*, 686 F. 2d 102, 108 (2d Cir. 1982) (Upholding cross-examination of clergyman as to whether certain nondisclosures by the defendant in certain loan applica-

tions would effect the witness's opinion of the defendant's character; case criticized in Wright & Graham as involving private matter not likely to be known by the witness).

The Second Circuit viewpoint, as set forth in *Birney* and the opinion below, that the entire scope of such cross-examination is committed to the trial court's discretion, and that it matters not whether the incident is "private" and therefore unlikely to be known in the community or to the witness, is plainly at odds with these principles. Simply calling a matter discretionary does not immunize it from judicial review. *See, Koon v United States*, 518 U.S. 81, 100 (1996). "A district court, by definition, abuses its discretion when it makes an error of law." *Ibid.*

The form of the question, a hypothetical assuming that the incident actually occurred, is similarly problematical. Contrary to footnote 2 in the opinion of the Court of Appeals, challenge to the form of the question *was* raised in the district court (Tr.836-37,846) and in the Court of Appeals after the motion panel indicated that it was an issue. (*See,* Appellee's Brief in Court of Appeals, p. 24, n.5; Appellant's Reply Brief in Court of Appeals, p.15, n.3).

According to *Michelson*, 335 U.S. at 482, in cross-examining character witnesses, "The form of inquiry, 'Have you heard?' has general approval, and 'Do you know?' is not allowed." The reason, of course, is that the question is designed to test credibility, not to suggest that the event actually occurred. Nonetheless, the Ninth Circuit has concluded that this aspect of *Michelson* did not survive the adoption of the Federal Rules of Evidence. *See, United States v Scholl*, 166 F.3d at 974.

The use of the guilt assuming hypothetical, moreover, amounted to a denial of confrontation. U.S. Court, Admt.VI; *see, Crawford v Washington*, 541 U.S. 36 (2004). Defendant was not given the opportunity to refute the out of court allegations of the Schapiro family, and the prosecution was given the opportunity to argue that the innuendo was substantive proof. As the prosecution argued in rebuttal summation, "I submit to you that the defendant's actions on the witness stand were staged. You heard him testify about his dog dying from cancer and didn't cry when his partner died from cancer when he talked about that." (Tr. 1374). In addition, the prosecutor argued that the incidents should be considered in sentencing. (S.35)

No limiting instruction was given. It has been almost universally held outside of the Second Circuit, however, that limiting instructions are ineffective to dispel the prejudice. *See, Monteleone*, 77 F.3d at 1091, quoting *Awkard v United States*, 352 F.2d 641, 645-46 (D.C. Cir. 1965).

This case presents a perfect fact pattern to resolve the conflict in the Circuits. The question was posed to Pelzer in the presence of the jury *before* the court required the prosecutor to set forth a basis for the inquiry. Even then, at no time did the prosecutor offer any theory for a good faith belief that the matter was known to the community or otherwise known by the witness. Therefore, the suggestion by the district court and the Court of Appeals that there was some sort of basis for community knowledge, because no one was sworn to secrecy, lacks any support in the record.

More important, the content of a partnership agreement is clearly a private matter. Absent litigation, when the document would become public, its contents are hardly a matter that the community, let alone an appellate court clerk,

would know. That the parties and their families may know about it does not change the equation. *Monteleone,* which the Second Circuit indicated it would not be inclined to follow, did not state a rule limited to grand jury testimony, and cannot be squared with the decision below.

Finally, it might not be amiss to note that there was even a serious question as to whether there was any contract breach. Because the agreement did not contain a clause against oral modification or waiver, the conduct of the parties could establish an oral modification or waiver. *See, e.g., United States v Merritt Meridan Constr. Corp.*, 95 F.2d 153, 165 (2d Cir. 1996) *affg.* 890 F.Supp. 1213 (S.D.N.Y. 1995); *Arrow Plumbing Co. v Dare Constr. Corp.*, 212 N.Y.S.2d 438, 441 (1961); 13 Williston on Contracts, § 39:36 (4th ed.). Since it is undisputed that defendant did not receive any of the proceeds of the policy, and that the change was made to induce Schapiro's mother to loan him money, there was no probative value or basis for the inquiry. Hence, it should not have been received pursuant to F.R. Evid. 403, as well.

D. Deception of a Court and a Tendency to Affect the Merits are Required Elements of 18 U.S.C. § 1512(c)(2)

The indictment charged a *completed* crime of obstruction of justice, in violation of 18 U.S.C. § 1512(c)(2), part of the Sarbanes-Oxley Act. *See*, Pub.L. No. 107-204, 116 Stat. 745 (2002). And defense counsel protested the effort to change the theory to an "attempt" at trial, after the Government declined to call the Magistrate Judge's law clerk and the Court refused to allow questioning as to whether justice was actually obstructed (Tr. 1248-52, 1340-41).

Although there is a great deal of legislative history for the Act, there is scant discussion of what eventually became 18 U.S.C. § 1512(c)(2), and this appears to be one of the first prosecutions under it. Because of the overlap with 18 U.S.C. § 1503, *see*, Roadcap, *Obstruction of Justice*, 41 Am. Crim. L. Rev. 911, 937 (2004), because of the reluctance of most courts to apply § 1503 to civil litigation, *see, e.g., Richmark Corp. v Timber Falling Consultants,* 730 F.Supp. 1525, 1532 (D.Ore. 1990) (civil defendant's counterclaim did not allege the predicate offense of obstructing justice under § 1503, as there were extensive remedies available in civil suits); *contra, United States v Lundwall*, 1 F.Supp.2d 249, 254-55 (S.D.N.Y. 1998), and because the literal language of § 1512(c)(2) could turn every potential Rule 11 violation into a criminal prosecution, this case is an excellent vehicle in which to define and refine its scope.

According to commentators, § 1512(c), which appears in the context of a statute that concerns witness tampering, was meant to cover instances in which a person *destroys or creates evidence* with the intent to affect the merits of an investigation or judicial proceeding. *See*, Anchincloss & Walsh, *Obstruction of Justice*, 42 Am. Crim.L.Rev. 721, 746-47 (2005); B. Vango, S. Kagen, & J. Classen, *The Sarbanes-Oxley Act of 2002: A Securities Litigation Perspective*, 132 PLI/Corp. 89, 111-12 (Practicing Law Institute, Sept.-Oct., 2002); *see also*, Note, *Anticipating Obstruction of Justice: Preemptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute*, 89 Corn. L. Rev. 1519 (2004); Note, *Evidence Tampering*, 53 Duke L.J. 1215 (2004). As one court has explained: "Section 1512(c) was one of the measured responses by Congress to improve the accuracy and reliability of corporate disclo-

sures by penalizing those who obstruct justice by somehow impairing the integrity or availability of records, documents and other tangible objects." *United States v Hutcherson*, __ F.Supp.2d __, 2006 WL 270019, *2 (W.D.Va.).

Although the decisions applying § 1503 are useful in assessing whether a particular course of conduct constitutes obstruction under § 1512(c)(2), the two provisions are strikingly dissimilar. Specifically, the "omnibus clause" of § 1503, which contemplates actions affecting the "due administration of justice" has no counterpart in § 1512(c)(2), which only contemplates actions affecting "any official proceeding." Thus, the reach of § 1512(c)(2) is necessarily more narrow than § 1503.

Even in the context of § 1503, "The act of altering or fabricating documents used or to be used in a judicial proceedings would fall within the obstruction of justice statute, *if the intent is to deceive the Court. United States v Craft*, 105 F.3d 1123, 1128 (6th Cir. 1997) (affirming dismissal of indictment on statute of limitations grounds). (Emphasis added).

In this case, the proof is clear. The bogus document was not filed in any court, and there is absolutely no evidence of any attempt to deceive any court. That was not the theory of the Government case and the jury was never instructed on such a theory. For that reason, the Court of Appeals made no mention of the issue, even though the district court found that question to be "substantial." 420 F.Supp.2d at 88 n.4. The district court's claim that the jury could have found that the Davidson firm was made an *"unwitting agent" of the defendant in connection with the mandamus proceeding, is belied by the lack of an instruction to the jury on such a theory and the lack of any basis*

in the evidence for it. The bogus order was never filed with the Second Circuit, and there was no dispute that the bogus order was void and unenforceable, and had no impact on the decisions of the Magistrate Judge.

Even if the purported deception would have induced the Davidson firm to withdraw the mandamus petition—and there was a decision by the Second Circuit denying the petition *on the merits*—it would not have had any impact on the litigation in the district court. As this Court has long recognized, mandamus is an extraordinary remedy, for extraordinary cases, and such writs are rarely granted. *See, e.g., Mallard v United States Dist. Court*, 490 U.S. 296, 309 (1989); *Allied Chem. v Daiflon*, 449 U.S. 33,34-35 (1980); *Will v United States*, 389 U.S. 90, 98 (1967). There is no case that has ever held that a judge may be compelled through mandamus to decide a motion on a timetable fixed by one of the litigants. Even if there were, the grant or denial of mandamus could not "affect" the Ryan Beck lawsuit in the district court. The motion would still have to be decided.

In fact, when the motion was decided, summary judgment was *denied. Ryan Beck & Co. v Fakih*, 268 F.Supp.2d 210 (E.D.N.Y.) *motion denied*, 273 F.Supp.2d 393 (E.D.N.Y.2003). The District Court held that there were questions of fact concerning the "asset sale" because it was a "sale" with no consideration and the name Gruntal survived.

From the opening and closing statements, it appears to be the Government position that, if anyone was "inconvenienced" in some manner, a violation of § 1512(c)(2) was established. This cannot be the law, because it would turn any Rule 11 sanction into a *de facto* crime. Distribution of

the bogus order to colleagues was an act done by Davidson himself and inconvenience or embarrassment does not constitute obstruction.

Although this Court does not grant certiorari to review facts, it should be noted that under the tests of *Arthur Anderson, LLP v United States*, 544 U.S. 696, 705-07 (2005) and *United States v Aguilar*, 515 U.S. 593, 599 (1995), which, if applicable to § 1512(c), would require a finding that the defendant's conduct had the "natural and probable effect" of interfering with the proceeding—here the *Ryan, Beck* lawsuit in the District Court—the conviction could not stand. The faxing of an unenforceable document could not "influence", i.e. have an affect on the merits, *see*, Webster's Third New International Dictionary, p. 1190, of the proceeding itself. Calling chambers, recalling letters, and the like simply has nothing to do with the *merits* of the proceeding. If it did, every discovery dispute could turn into a criminal prosecution. Section 1512(c) was not meant to have such an effect.

E. Absent "Clear Evidence of What was Said" a Conviction Under 18 U.S.C. § 1001 Cannot Stand.

The indictment in this case charged defendant with having made a "materially false, fictitious, and fraudulent statement . . . [to] the F.B.I., in that defendant falsely *stated* and represented that the Forged Order was not faxed from his home, when, in fact, as he then and there well know and believed, the Forged Order was faxed from his home" (emphasis added).

At trial, however, two agents testified from notes—there was no recording or transcript—that the defendant never *admitted* that he sent the bogus order (Tr. 601, 770, 778).

As one agent said, "He never told us that he sent the fraudulent order" (Tr. 778). Defendant testified that, in response to the agent's alleged offer of non-prosecution if he would say it was a *joke*, "no, I told them distinctly no matter what, no matter [what] the consequences are . . . I would never say that [it was a joke]. I didn't do it [; a]s I sit here today, I will never say that I did something I didn't do." (Tr. 896).

Despite the lack of a specific question and a specific answer, the Second Circuit agreed with the district court's conclusion that the jury could infer from this testimony that "defendant denied having sent the forged order to the Davidson firm."

Other Circuits have rejected the notion that a conviction under 18 U.S.C. § 1001(a)(2) can rest upon what the agents believe an individual meant; there must be clear evidence of what was said and a full appreciation of the context in which the statement was made. *See, e.g., United States v Jiang*, 476 F.3d 1026 (9th Cir. 2007); *United States v Good*, 326 F.3d 589 (4th Cir. 2003); *United States v Sainz*, 772 F.2d 559 (9th Cir. 1985).

In *Jiang*, as here, the interview was not recorded and there was no specific question and denial. Finding the exchange ambiguous, the Ninth Circuit reversed, observing that the agent should have asked a specific question. Quoting from *Sainz*, the Court said, "'[T]he consequences of imprecision in the language used to question a witness must be laid at the table of the questioner, not the questioned.'" 476 F.3d at 1030, quoting *Sainz*, 772 F.2d at 564. The conviction could not be sustained on that theory that the agent "thought" that the defendant had meant his response to be.

If *Jiang, Sainz*, and the decisions they relied upon, are correct, the conviction here could not stand either. The agents said that defendant never *admitted* that he sent the false order. The indictment, however, charged that defendant made an affirmative statement. Defendant's testimony that he rejected the agent's offer to say that the episode was a joke doesn't turn the lack of an admission into an affirmative statement. All defendant said was that, as he was sitting in court, he wouldn't say that he did "it."

This case thus presents the Court with the opportunity to resolve the conflict in the Circuits and squarely hold that there must be a specific question and a specific answer, as reflected in a recording, transcript, or other written document. A conviction should not be based on surmise, supposition or conjecture. The lack of precision falls on the agents, not the defendant.

F. Depending Upon this Court's Decisions in *Clairborne v United States*, Docket No. 06-5618, and *Rita v United States*, Docket No. 06-5754, the Case Should Be Remitted for Reconsideration of Sentence.

The pre-sentence report calculated the defendant's combined adjusted offensive level at 18, which included a two point enhancement for abuse of a "special skill" (U.S.S.G. § 3B1.3) and a two point enhancement for obstruction of justice (U.S.S.G. § 3C1.1). The Court also considered the prosecution argument that defendant's purportedly unauthorized change in a life insurance policy was a strong factor to consider in imposing sentence (S. 35).

Although the Second Circuit, among others, has held that the confrontation clause, U.S. Const., Admt. VI, and

this Court's decision in *Crawford v Washington*, 541 U.S. 36 (2004), have no impact in sentencing, *see, United States v Martinez*, 413 F.3d 239, 243 (2d Cir. 2005), it may be that *Clairborne* and *Rita* will address this and other issues. If so, the defendant should have the benefit of those decisions.

CONCLUSION

This case presents substantial issues of public importance that have divided the circuits.

The petition for certiorari should be granted.

Dated: Suffolk County, New York
May 29, 2007

Respectfully submitted,

FREDERICK C. MEYER, ESQ.
Counsel of Record
10 Sagamore Road
Hampton Bays, New York 11946
631-728-8778